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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

WASHINGTON PHYSICIANS SERVICE ASSOCIATION; PACIFICARE OF WASHINGTON, INC., a health care service contractor; SELECTCARE HEALTH PLANS, a Health Maintenance Organization; QUALMED WASHINGTON HEALTH PLAN, INC., a Health Maintenance Organization; KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, INC., a Health Maintenance Organization; BLUECROSS AND BLUESHIELD OF OREGON, a health care service contractor; GROUP HEALTH COOPERATIVE OF PUGET SOUND, a Health Maintenance Organization; PREMERA BLUE CROSS (formerly BLUE CROSS OF WASHINGTON AND ALASKA, and MEDICAL SERVICE CORPORATION OF EASTERN WASHINGTON), a health care service contractor, REGENCE BLUESHIELD (formerly PIERCE COUNTY MEDICAL BUREAU, INC., and KING COUNTY MEDICAL BLUESHIELD), a health care service contractor,

Petitioners,

v.

CHRISTINE GREGOIRE, in her official capacity as Attorney General for the State of Washington; DEBORAH SENN, in her official capacity as Insurance Commissioner of the State of Washington,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENTS' OPPOSITION TO WRIT OF CERTIORARI

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I.

INTRODUCTION

The Ninth Circuit's opinion in *Washington Physicians Service Association* has become the starting point for a wholesale rejection of established Supreme Court precedent by the Ninth Circuit and a new approach to the "relates to" test which threatens not only the uniform regulation of employee health benefit plans but the uniform regulation of any plan subject to ERISA. *See Emard v. Hughes Aircraft Company,* 153 F.3d 949, 956 (9th Cir. 1998) (relying on *Washington Physicians Service Association* to distinguish *Metropolitan Life* and opinions of the 2nd, 4th, 5th, 6th, 7th, 8th, and 11th Circuits). The Ninth Circuit's opinion regarding risk shifting and laws directed at the insurance industry directly conflicts with the Fifth and Eighth Circuits. Finally, the Ninth Circuit's approach to the McCarran-Ferguson test further conflicts with the Third, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits. As such, review by this Court is necessary to ensure proper interpretation of its established precedents, to resolve an existing conflict among the Circuits and to ensure the uniform regulation of employee benefit plans subject to ERISA.

II.

REASONS WRIT SHOULD BE GRANTED

1. The Ninth Circuit's opinion cannot be reconciled with the Supreme Court's decision in *Metropolitan Life* or *Travelers.*

The respondents indicated that this Court found that the Massachusetts statute challenged in *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380 (1985) "related to" an ERISA plan because the statute expressly applied to "any employees' . . . welfare fund." *See,* Brief for Respondents in Opposition at pages

10-11. The respondents' analysis is erroneous because the State of Massachusetts had previously conceded that the portion of the statute that applied to employees' welfare benefit plans was severable from that portion of the statute that applied to insurers and was preempted. *Id.* at FN. 14, 471 U.S. 724, 736, 105 S.Ct. 2380, 2387. At issue in *Metropolitan Life* was whether insurers were required to provide mental-health benefits in policies of accident and sickness insurance that were promulgated or renewed for a person in the state. *Id.*, 471 U.S. 724, 729, 105 S.Ct. 2380, 2384. This Court held that although the statute was directed at insurers it regulated the content of insured employee benefit plans and, therefore, "related to" ERISA:

> Though Section 47B is not denominated a benefit-plan law, it bears indirectly but substantially on all insured plans, for it requires them to purchase the mental-health benefits specified in the statute when they purchase a certain kind of common insurance policy.

Id., 471 U.S. 724, 739, 105 S.Ct. 2380, 2388.

Contrary to the Respondents' suggestion, this Court in *New York State Conference of Blue Cross Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671 (1995) did not overrule *Metropolitan Life*. *See* Brief for Respondents in Opposition at p. 11. Rather, in *Travelers*, this Court once again affirmed that state laws that regulate insurance policies that are sold to employers "relate to" employee benefit plans:

> The commercial challengers counter[ed] by invoking the earlier case of *Metropolitan Life Insurance Co. v. Massachusetts*, . . . , which considered whether a state could mandate coverage of specified minimum mental-health care benefits by policies insuring against hospital and surgical expenses. Because the regulated policies included those bought by employee welfare

> benefit plans, we recognize that the law "directly affected" such plans.

514 U.S. 645, 662-663, 115 S.Ct. 1671, 1680 (internal citations omitted).

The Court went on to state that although not all regulation of insurance or insurers would relate to employee benefit plans, state laws that mandate substantive coverage or require plans to utilize insurance to insure against an entire category of illness that they might otherwise choose to leave without coverage, "relate to" employee benefit plans:

> The New York surcharges do not impose the kind of substantive coverage requirements binding plan administrators that was at issue in Metropolitan Life. Although even in the absence of mandated coverage there might be a point at which an exorbitant tax leaving consumers with a Hobson's choice would be treated as imposing a substantive mandate.

514 U.S. 645, 662, 115 S.Ct. 1671, 1681.

In the instant case, the Every Category of Provider statute mandates coverage of providers that an employee benefit plan might otherwise choose not to utilize. As such, RCW 48.43.045 bears indirectly but substantially on employee welfare plans that utilize insurance and, therefore, "relates to" the employee benefit plans within the meaning of *Metropolitan Life* and *Travelers*. The Ninth Circuit's opinion to the contrary effectively overrules *Metropolitan Life* and *Travelers*. It renders the "relation to" test and the "savings clause" obsolete, because any law regulating insurance by necessity would regulate the contents of an insurance policy and would "relate to" insured employee benefit plans.[1]

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[1] Respondents suggest that the savings clause is not rendered obsolete because it still may apply to laws that do not

2. The Ninth Circuit's distinction between a policy issued by the insurer and a welfare benefit plan established by the employer is irrelevant to the "relates to" test.

Health plans are classified as employee welfare plans under ERISA. Health plans are subject to ERISA regardless of whether they are *insured* or *self-insured*. The only requirement imposed on such plans to be covered by ERISA is that such plans be maintained by an employer or by an employee organization. *See* ERISA § 3(1); 29 U.S.C. 1002(1); App. at 130. Under regulations promulgated by the Department of Labor, and cited with approval by Ninth Circuit, a plan will be considered to be maintained by an employer if:

(i) the employer pays any part of the premium;

(ii) the employer requires employees to participate; or

(iii) the employer endorses the program.

See 29 C.F.R. § 2510.3-1(j); App. at 158; *Silvera v. Mutual Life Insurance Co. of New York*, 884 F.2d 423, 425 (9th Cir. 1989). Under the above-referenced rules, individual insurance policies sold to employees will constitute a plan maintained by the employer, if the employer pays or reimburses, in whole or in part, employees for the purchased policies; the employer requires employees to participate; or the employer endorses the program of a particular health carrier.

Petitioners presented evidence to the Ninth Circuit that indicated less than six percent of the health plans

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regulate the contents of insurance policies. Respondents' analysis, however, is incorrect because if the law does not regulate the content of insurance policies, the law will fail to satisfy the prongs of the McCarran-Ferguson test, and will, therefore, not be an insurance law subject to the "savings clause."

delivered, issued for delivery or renewed by a health carrier would be non-ERISA plans. *See* Brief of Appellees at page 37. Respondents took issue with this number and claimed that twelve to thirteen percent of the health plans delivered, issued for delivery or renewed by a health carrier would be non-ERISA plans. *Id.* Therefore, it is undisputed that at least eighty-seven percent of all health plans subject to the Every Category of Provider Statute are ERISA plans. As such, the statute clearly was directed at ERISA plans and RCW 48.43.045(1) is clearly not a statute of general applicability.

The Ninth Circuit's suggestion that the statute does not "relate to" employee benefit plans because such plans could self-insure is without merit and contrary to established Supreme Court precedent. App. at p. 10. For many employee health plans, the size of the group being covered is too small to make self-insurance a viable option. Moreover, this Court has held that any law that would force an employee benefit plan to change its basic structure and administration, e.g., change from insured to self-insured, would "relate to" an employee benefit plan and would be preempted unless saved from preemption as a law regulating insurance. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2388 (1985) (statute that requires plan to purchase benefits specified in the statute "relates to" ERISA); *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2899-2900 (1983) (law that prohibits plans from structuring benefits in a specific manner preempted); *FMC Corp. v. Holliday*, 498 U.S. 52, 59-60, 111 S.Ct. 403, 408 (1990) (law prohibiting plans from being structured in a manner to require reimbursement is preempted); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524, 101 S.Ct. 1895, 1907 (1981) (law prohibiting a plan structure that banned workers compensation offsets was preempted).

3. The Ninth Circuit's analysis reflects a difference in interpretation of Supreme Court precedent and not a difference in statutory interpretation. This difference in interpretation has resulted in a conflict between the Ninth Circuit and the Eighth and Fifth Circuits.

For purposes of the "relation to" analysis, the Washington Every Category of Provider statute is virtually identical to the Arkansas Patient Protection Act that was examined by the Eighth Circuit in *Prudential Insurance Company of America v. National Park Medical Center, Inc.*, 154 F.3d 812 (8th Cir., 1998). The Arkansas statute applies to "health care insurers" while the Washington statute similarly applies to "health carriers." *Id.* at 815; App. at 9. The Arkansas statute regulates health benefit plans and the Washington statute similarly regulates health benefit plans or health plans. *Id.* at 816; App. at 7. The Arkansas statute defines a health benefit plan as "any program that provides reimbursement, including capitation, for health care services." *Id.* at 816. The Washington statute similarly defines a health plan or a health benefit plan as "any policy, contract, or arrangement offered by a health carrier to provide, arrange, reimburse or pay for health care services." App. at 7. The Arkansas statute contains a specific exclusion for self-funded or other health benefit plans that are exempt from state regulation by virtue of ERISA. *Id.* at 816. The Washington statute similarly excludes employer-sponsored self-funded plans. The Ninth Circuit has further interpreted this provision to exclude all health benefit plans that are exempt from ERISA. App. at pps. 10-11. Both the State of Arkansas and the State of Washington have argued that the statutes do not relate to ERISA, because the statutes do not regulate the plans at all, but only insurers. *Id.* at 822; App. at 15. Although the statutes are virtually identical, the Circuits have reached different results based on an independent interpretation of existing Supreme Court precedent.

The Ninth Circuit has held that the Supreme Court has embarked on a new approach to preemption, and the prior decisions of the Supreme Court, therefore, provide little guidance. *See Washington State Physician Services*, App. 12-13; *Emard v. Hughes Aircraft Company*, 153 F.3d 949, 956 (9th Cir. 1998). The Eighth Circuit, however, noted that this Court in *Travelers* did not reject established Supreme Court precedent and its prior opinion can be relied upon for guidance. *National Park*, 154 F.3d 812, 820 (8th Cir. 1998). This difference in analysis produces vastly different results – the Eighth Circuit finding the Arkansas statute "relates to" an ERISA plan and the Ninth Circuit finding that the Washington Every Category of Provider statute does not "relate to" an ERISA plan. Because the Eighth and the Ninth Circuits have reached conflicting decisions based on interpretations of the same established Supreme Court precedent, Certiorari should be granted in order that this Court can resolve the issue.

4. A conflict exists among the Circuits as to the proper interpretation of this Court's opinion in *Royal Drug* and the risk shifting element of the McCarran-Ferguson Test.

To date, five Circuits have decided cases related to mandated provider or alternative provider laws. *CIGNA Healthplan of Louisiana, Inc. v. State of Louisiana*, 82 F.3d 642 (5th Cir. 1996); *Texas Pharmacy Association v. Prudential Insurance Company of America*, 105 F.3d 1035 (5th Cir. 1997); *Prudential Insurance Company of America v. National Park Medical Center, Inc.*, 154 F.3d 812 (8th Cir. 1998); *Blue Cross and Blue Shield of Kansas City v. Bell*, 798 F.2d 1331 (10th Cir. 1986); *Stuart Circle Hospital Corporation v. Aetna Health Management*, 995 F.2d 500 (4th Cir. 1993); *Washington Physicians Service Association v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998). With the exception of the Ninth Circuit, all

of the Circuits have found the "reference to" or "relates to" prong of preemption satisfied. *CIGNA*, 82 F.3d at 648; *Texas Pharmacy*, 105 F.3d at 1037; *National Park*, 154 F.3d at 925; *Stuart Circle*, 995 F.2d at 502; *Bell*, 798 F.2d at 1332. A more even split has developed as to whether such laws are "saved" from preemption as a law regulating insurance. The Fifth and the Eighth Circuits have found the statutes are not saved and are thus preempted by ERISA. *National Park*, 154 F.3d at 829; *Texas Pharmacy*, 105 F.3d at 1038; *CIGNA*, 82 F.3d at 649. On the other hand, the Ninth, Tenth and Fourth Circuits have found such laws are saved from preemption as laws regulating insurance. *Stuart Circle*, 995 F.2d at 503; *Washington Physicians Service Assoc.*, 147 F.3d at 1045-1046; *Bell*, 798 F.2d at 1334. The Respondents assert that these differences in results are attributable solely to differences in statutory language and do not result from differing interpretations of ERISA or this Court's precedent. *See* Brief of Respondents in Opposition at p. 15.

As previously explained, the different results among the Circuits with respect to the "relates to" test are the result of differing interpretations of this Court's opinion in *Travelers* and were not the result of differences in the state statutory language before the Circuits. Similarly, the differences in result as to whether a state statute is "saved" from preemption as a law regulating insurance are the result of differing interpretations of this Court's opinion in *Royal Drug* and the risk shifting element of the McCarran-Ferguson test and not differences in statutory interpretation.

Central to the "savings clause" and "risk shifting" analysis of the Circuit Courts is an analysis of this Court's opinion in *Group Life and Health Insurance Co. v. Royal Drug*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed. 261 (1979). There is a striking similarity between the pharmacy agreements in *Royal Drug* and a health plan's limited provider agreement that restrict participation to

particular providers and categories of providers. The insureds in *Royal Drug* received a certain level of reimbursement for medical treatment if they used pharmacists from a preferred list and had to pay more for their medication if they used pharmacists who were not part of the network agreement. *Id.* 440 U.S. at 209, 99 S.Ct. at 1072. Similarly, individuals covered by a health plan receive a certain level of reimbursement or benefits if they choose among physicians (which may be only specified categories of providers) included in a network, and generally receive less or no reimbursement if such individuals choose other providers. Also, just as the pharmacy agreements were a means to control Blue Shield's cost in *Royal Drug*, so are limited provider arrangements used to limit a health plan's cost for health care treatment. Under this analysis, RCW 48.43.045(1) is preempted because the statute merely regulates the purchase of goods and services and does not regulate the business of insurance. *Accord, National Park,* 154 F.3d at 827-828 (8th Cir. 1998). On the other hand, *Royal Drug* has been distinguished by other Circuits, finding that the choice of provider is not merely a "good or service" but, rather, an element of the insurance risk which an insured must bear. *Stuart Circle,* 995 F.2d at 504 (4th Cir. 1993).

Review by this Court is necessary to resolve this conflicting interpretation of *Royal Drug* and to resolve the split in the Circuits as to the proper interpretation of the Savings Clause. Review by this Court is also necessary to resolve the conflict between the Circuits as to whether all three parts of the McCarran-Ferguson test must be satisfied. The Third, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits hold that a state law must be treated as regulating insurance under both the "common sense view" and all three parts of the McCarran-Ferguson analysis in order to be saved from preemption. *See* Petition for Writ of Certiorari at pp. 16-17. In direct conflict, the

Ninth Circuit has held a state law must meet the "common sense" test and only two of the three parts of the McCarran-Ferguson Act to be saved from preemption. *See Cisneros v. UNUM Life Ins. Co. of America*, 134 F.3d 939, 946 (9th Cir. 1997).

III.

CONCLUSION

The Ninth Circuit has overruled this Court's opinion in *Metropolitan Life* and has established a new approach to the "relates to" test that conflicts with Second, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits. The Ninth Circuit's approach to the McCarran-Ferguson test also directly conflicts with the Third, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits. Finally, the Ninth Circuit's holding with respect to risk shifting and laws directed at the insurance industry conflicts with this Court's opinion in *Royal Drug* and with the Fifth and Eighth Circuits. Review by this Court is necessary to resolve these conflicts and to ensure the uniform regulation of employee benefit plans. For these reasons, Petitioners urge the Court to grant a Writ of Certiorari.

Respectfully submitted,

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